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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TONYA L. LEWIS, Defendant and Appellant.	B260773 (Los Angeles County Super. Ct. No. MA060895)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Reversed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

On a Friday morning in 2013, Tonya L. Lewis stole a ring worth $272.50 from a jeweler. A few hours later, she returned to the jeweler and stole a bracelet and necklace worth $1,226.25. She was charged with second degree burglary in two identical counts, neither of which stated the value of the property taken. Lewis pleaded guilty to count 1 in exchange for dismissal of count 2 (and other counts), and was sentenced to a four-year jail term.

In November 2014, the voters enacted Proposition 47, which among other things permits a felon serving a sentence for second degree burglary to petition the court for resentencing as a misdemeanant if the value of the property taken was $950 or less. Lewis thereafter filed a petition to recall her sentence. The Los Angeles County District Attorney opposed the petition, contending nothing in the prosecution's records revealed whether count 1 was based on the $272 theft or the $1,226 theft. Therefore, the prosecutor argued, Lewis could not prove the loss was less than $950, and was thus ineligible for relief. The trial court agreed, and denied Lewis's petition on the ground she failed to make a prima facie showing that the loss was less than $950.

Assuming for present purposes that a petitioner for relief under Proposition 47 must as a preliminary matter establish his or her facial eligibility for resentencing, we conclude Lewis met that burden because the criminal complaint itself establishes that eligibility. The burden then shifted to the prosecution either to rebut her showing or to establish she was otherwise ineligible for resentencing. Accordingly, we reverse the trial court's order and remand for further consideration of Lewis's petition.

BACKGROUND

We obtain the facts from a 2013 police report. On the morning of September 20, 2013, Lewis entered Begue Jewelers and purchased a ring for $272.50 using a check from a closed bank account. Later that afternoon, she returned to the store and purchased a bracelet and necklace for $1,226.25, again using a check from the closed account. Lewis then sold the jewelry at Rick's Pawn Shop for $285. The following day, Lewis purchased an $872 ring from Begue, paying with a third check from the closed account, then sold the ring at Superior Pawn for $45.

When a bank representative informed Alejandro Begue that the account on which the checks were drawn was closed, he called the Los Angeles County Sheriff's Department. Sheriff's deputies arrived and took Begue's statement and retrieved the checks, and upon leaving the premises ran into Lewis, whom they arrested. Lewis admitted she purchased the jewelry with checks drawn on a closed account, pawned the jewelry, and spent the money on a hotel room and crack cocaine. She also admitted to having entered four other stores that week with the intent to purchase merchandise with bad checks. (The deputies had found four declined checks in her purse.)

On September 24, 2013, Lewis was charged with five counts of second degree burglary and one count of check fraud (Pen. Code, §§ 459, 476a, subd. (a)),[1] as follows:

> COUNT 1
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> On or about September 20, 2013, in the County of Los Angeles, the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation of PENAL CODE SECTION 459, a Felony, was committed by TONYA LYNN LEWIS, who did enter a commercial building occupied by BEGUE JEWELRY with the intent to commit larceny and any felony.
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> COUNT 2
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> On or about September 20, 2013, in the County of Los Angeles, the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation of PENAL CODE SECTION 459, a Felony, was committed by TONYA LYNN LEWIS, who did enter a commercial building occupied by BEGUE JEWELRY with the intent to commit larceny and any felony.
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> COUNT 3
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> On or about September 21, 2013, in the County of Los Angeles, the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation of PENAL CODE SECTION 459, a Felony, was committed by TONYA LYNN LEWIS, who did enter a commercial building occupied by BEGUE JEWELRY with the intent to commit larceny and any felony.
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> COUNT 4
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> On or about September 20, 2013, in the County of Los Angeles, the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation

[1] Undesignated statutory references will be to the Penal Code.

of PENAL CODE SECTION 459, a Felony, was committed by TONYA LYNN LEWIS, who did enter a commercial building occupied by RICK'S PAWN SHOP with the intent to commit larceny and any felony.

COUNT 5

On or about September 20 [*sic*: 21], 2013, in the County of Los Angeles, the crime of SECOND DEGREE COMMERCIAL BURGLARY, in violation of PENAL CODE SECTION 459, a Felony, was committed by TONYA LYNN LEWIS, who did enter a commercial building occupied by SUPERIOR PAWN with the intent to commit larceny and any felony.

COUNT 6

On or between September 20, 2013 and September 21, 2013, in the County of Los Angeles, the crime of NON-SUFFICIENT FUND CHECK MULTIPLE CHECKS (FELONY), in violation of PENAL CODE SECTION 476a(a), a Felony, was committed by TONYA LYNN LEWIS, who did unlawfully and fraudulently make, draw, utter, and deliver checks and drafts for the payment of money the total amount of which exceeded Four Hundred Fifty Dollars ($450), hereinafter listed:

Date	Payee	Bank	Amount
09/20/2013	BEGUE JEWELRY	WELLS FARGO	$272.50
09/20/2013	BEGUE JEWELRY	WELLS FARGO	$1,226.25
09/21/2013	BEGUE JEWELRY	WELLS FARGO	$872.00

knowing at the time of such making, drawing, uttering, and delivering, that he/she had not sufficient funds in, and credit with, said bank to meet the said checks and drafts and all other checks, drafts, and orders upon such funds then outstanding in full upon their presentation for payment; the said defendant at all of said times having the intent then and there to cheat and defraud said persons and corporation(s).

On September 24, 2013, before a preliminary hearing was held or probation report prepared, Lewis pleaded guilty to count 1 in exchange for dismissal of counts 2-6, and admitted to eight prior convictions for theft, burglary, drug possession and false personation. She was sentenced to four years in county jail—the middle term of two years plus two one-year enhancements. (§§ 667.5, subd. (b), 1170, subd. (h).) The court also assessed a restitution fine of $280, multiplied by four due to the four-year sentence

imposed, stating this was the "legal minimum amount that has to be charged."[2] (§ 1202.4, subd. (b).)

On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which reduces certain nonserious and nonviolent crimes, such as low-level drug- and theft-related offenses, from felonies to misdemeanors. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 889-890.) A person serving a sentence for a felony that was reclassified under Proposition 47 may petition the trial court for a recall of sentence and request resentencing, which must be granted unless the court determines an unreasonable risk exists that the petitioner will commit a violent felony if released from incarceration. (§ 1170.18, subds. (a), (b), (c).) As pertinent here, Proposition 47 added section 459.5, entitled "Shoplifting," to the Penal Code. Section 459.5 defines shoplifting, as entry into a commercial establishment with intent to commit larceny, "where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." Shoplifting is punished as a misdemeanor unless the offender has suffered one of a number of disqualifying prior convictions. (§ 459.5.) Before Proposition 47 was enacted, shoplifting merchandise of any value constituted second degree burglary, a "wobbler" (crime that can be punished as either a misdemeanor or felony). (§§ 459, 461.)

On November 14, 2014, Lewis filed a handwritten petition for recall of her sentence, arguing her second degree burglary conviction "can be reduced to a misdemeanor."

At the petition hearing, the public defender representing Lewis argued she was eligible for resentencing because nothing in the record of conviction indicated the loss at issue amounted to more than $950. The prosecution argued Lewis's petition should be denied at the outset because she failed to meet her initial burden of establishing the value of the property she burgled was less than $950. In any event, the prosecution argued, the

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[2] The court was incorrect, but the point is irrelevant. (See § 1202.4, subd. (b) [$280 was the minimum].)

police report showed the property Lewis stole was worth $2,370.75. The prosecutor conceded Lewis would pose no unreasonable risk of committing a violent felony if released from jail.

The trial court stated Proposition 47 petitioners must make "a prima facie case that they're entitled to the relief requested. [¶] And making a prima facie showing means pleading sufficient facts, which if found true, creates a [rebuttable] presumption that petitioner is entitled to relief." Specifically as to section 459, the court found a petition must expressly allege the loss at issue was $950 or less. The court found Lewis's petition failed to allege the amount in question, and further found that nothing in the court file provided "any information . . . regarding whether or not the amount in question [was] above or below the $950." The court did "not believe that the intent of Proposition 47 was for petitioner to be entitled to relief when the record is silent on the issue of value." It therefore denied Lewis's petition. The court also denied Lewis's petition on the alternate ground that after having considered the police report (over Lewis's hearsay objection), it was of the opinion that "the dollar amount in question . . . was in excess of $950."

Lewis timely appealed.

DISCUSSION

The issue is whether Lewis was convicted for theft of property valued at $950 or less.

Proposition 47 was enacted "to ensure that prison spending is focused on violent and serious offenses, maximize alternatives for nonserious, nonviolent crime, and invest the savings generated from this Act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment. Th[e] Act ensures that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed." (Note, Deering's Ann. Pen. Code, § 1170.18 (2015 supp.) p. 79.)

As noted above, Proposition 47 reduced the penalties for a number of offenses, including second degree burglary where the defendant enters a commercial establishment

with the intent to steal property valued at not more than $950. That offense is now "shoplifting," as defined in the new section 459.5. Shoplifting will be punished as a misdemeanor unless the offender has suffered a prior conviction for a serious or violent felony or an offense requiring registration as a sex offender. (§ 459.5.)

Proposition 47 also added section 1170.18, which creates a process by which "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony" that was reclassified as a misdemeanor by Proposition 47 may petition for a recall of sentence to request resentencing in accordance with the statute reclassifying the offense. (§ 1170.18, subd. (a).) "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a)." If he or she does, "the petitioner's felony sentence shall be recalled and the petitioner resentenced . . . , unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) "'[U]nreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony." (§ 1170.18, subd. (c).)

Section 1170.18 does not allocate a burden of proof. A recent treatise suggests a Proposition 47 petitioner bears the initial burden of "establishing" eligibility for resentencing, which as pertinent here would include the burden of "proving" the value of the property stolen did not exceed $950. (Couzens & Bigelow, Proposition 47: "The Safe Neighborhoods and Schools Act" (Feb. 2015) p. 40 <http://www.courts.ca.gov/documents/Prop-47-Information.pdf> [as of July 12, 2015] (Couzens & Bigelow).)[3]

[3] Couzens and Bigelow state: "The petitioner will have the initial burden of establishing eligibility for resentencing under section 1170.18(a): i.e., whether the petitioner is currently serving a felony sentence for a crime that would have been a misdemeanor had Proposition 47 been in effect at the time the crime was committed. If the crime under consideration is a theft offense under sections 459.5, 473, 476a, 490.2, or 496, the petitioner will have the additional burden of proving the value of the property did not exceed $950. [¶] Assuming the petitioner has been convicted of a qualified crime, the burden will be on the prosecution to establish that the petitioner has been

If by "establishing" eligibility and "proving" the value of stolen property Judge Couzens and Justice Bigelow mean a petitioner must specify in the petition what felony she was convicted of and allege the value of the property at issue was $950 or less, we agree. Proposition 36, passed in 2012, is analogous to Proposition 47 in that it provides a mechanism—set forth in section 1170.126—for resentencing in three strikes cases. (Couzens & Bigelow, *supra*, at p. 6 ["the basic structure of Proposition 47 is strikingly similar to Proposition 36"].) "Some of the statutory language [in Proposition 47] is taken directly from section 1170.126, the resentencing provisions of Proposition 36. Accordingly, much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47." (*Ibid.*) Proposition 36 requires that a petition for a recall of sentence "specify all of the currently charged felonies . . . and . . . shall also specify all of the prior convictions alleged and proved . . . ." (§ 1170.126, subd. (d).) It is reasonable to require a Proposition 47 petitioner to meet a similar standard.

Lewis met that burden here by pointing to the criminal complaint. Lewis contends evidence in the record suggests count 1 was based on the first-in-time burglary, as to which the property at issue was worth $272. She observes that counts 4 and 5—which referenced the pawn shop burglaries—were set forth chronologically; count 6 listed the jewelry store checks chronologically; and the information placed the Friday jewelry store burglaries (counts 1 & 2) before the Saturday burglary (count 3). Lewis argues this implies count 1 corresponded to the first jewelry store burglary and count 2 to the second. She further observes that the police report discussed and attached copies of the three

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convicted of a disqualifying 'super strike,' or is required to register as a sex offender under section 290(c). Although there is no express pleading and proof requirement regarding the disqualifying factors, as a practical matter the prosecution will have access to the necessary court records to establish the exclusion. Additionally, there is a general principle that if a party seeks the benefit of an exclusion, the burden of proving the exclusion is on the party seeking it. [Citation.] It is unlikely that the language in section 1170.18(b), that the 'court shall determine whether the petitioner satisfies the criteria in subdivision (a),' is meant to place the burden on the petitioner to show that he is not excluded because of a prior conviction or sex registration." (Couzens & Bigelow, *supra*, at pp. 40-41.)

checks in chronological (and numerical) order, and that the correspondence of the third count in the information to the third check implies the first count corresponded to the first check, i.e., that the deputy district attorney who drafted the information was tracking the police report. Lewis argues these reasonable inferences satisfied her prima facie burden of proving the property at issue was worth less than $950, and burden therefore shifted to the prosecution to prove she was ineligible for resentencing.

The inferences may be valid. But any valuation of property would have been irrelevant in 2013 because at that time, second degree burglary predicated on entry into a commercial establishment for the purpose of shoplifting carried no property value component; entry with intent to steal property worth any amount would have completed the crime. The prosecutor therefore had no incentive to tie the count of conviction to any particular dollar amount, and probably did not do so. Certainly nothing in the charging document does so explicitly. And nothing there or in the court record or the police report supports the trial court's finding that count 1 pertained to burglary of property worth more than $950.

To the extent the record in this case is unclear, the question is who should bear the consequence of the prosecution's nonspecific pleading. Clearly, the People must. A defendant is "entitled to be apprised with reasonable certainty of the nature and particulars of the crime charged against him, that he may prepare his defense, and, upon acquittal or conviction, plead his jeopardy against further prosecution." (*People v. Lee* (1895) 107 Cal. 477, 480.) "A person cannot be convicted of an offense, not charged against him in the indictment or information, whether or not there was evidence at trial to show that he committed the offense. [Citation.] Notice of the specific charge against a defendant is the constitutional right of the accused." (*People v. Puckett* (1975) 44 Cal.App.3d 607, 611-612.) Because Proposition 47 effectively winds back the clock with respect to Lewis's conviction for second degree burglary, to deny her resentencing relief due to the prosecution's failure to specify the value of the property taken would essentially subject her to continued incarceration for an uncharged and unproven offense—theft of property worth more than $950.

We conclude that because the record fails to demonstrate that the burglary charged in count 1, upon which Lewis was convicted, was for theft of property worth more than $950, Lewis satisfies the criteria set forth in subdivision (a) of section 1170.18. The trial court must therefore recall her sentence and resentence her pursuant to section 459.5 unless it determines that resentencing her would pose an unreasonable risk of danger to public safety.

DISPOSITION

The order denying Lewis's petition for recall of sentence is reversed. The trial court is directed to reconsider her eligibility for resentencing.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

MOOR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.